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No. 06-15

IN THE

Supreme Court of the United States

RICHARD TOMIC,

Petitioner,

v.

CATHOLIC DIOCESE OF PEORIA,
a religious corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an exception to federal employment laws arising under the First Amendment bars a Music Director's claim for age discrimination, where the Music Director served as a spiritual leader and filled a prominent and indispensable role in the celebration of the Catholic worship service?

RULE 29.6 NOTATION

The Respondent has no parent, and there are no publicly held companies that hold any stock of the petitioner.

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STATEMENT OF THE CASE

In 1996, St. Mary's Cathedral hired Petitioner, Richard Tomic, as the Director of Music and Organist. He later assumed the additional role of Director of Music and Organist for the Catholic Diocese of Peoria.

In his Statement of the Case, Petitioner offers a description of the organist and music director's duties, but in doing so, appears to have minimized any reference to his direct participation in the Catholic Church service other than "playing the organ." Indeed, to read Tomic's Statement leaves one with the impression that he played little or no role at all in the actual church service. In fact, Tomic's employment agreement explicitly stated that he would be compensated for "participation" and "direction "of diocesan liturgical events such as ordinations, Chrism Mass, Mass for New Catholics, the Rite of Election, and funerals of clergy (Pet., p. 29a-30a). The employment agreement described the position of Music Director as follows:

> **Position Goal:** To assist the Office of Divine Worship in preparing and celebrating various diocesan liturgies. To prepare and present various workshops or resources as requested. To assist other diocesan entities, viz. parishes, religious communities, and/or diocesan offices in planning and celebrating liturgical events as requested.

The employment agreement provided that the music director was directly accountable to the Director of the Office of Divine Worship or, in her absence, to the Vicar General.

As to his position as Organist / Music Director for St. Mary's, Tomic received compensation of an annual salary, which was supplemented with fees for performing at weddings

and funerals at the Cathedral. The agreement described the position of Organist / Music Director as follows:

Organist / Accompanist

1. Practice Cathedral-scale organ literature to be played before, during, and after the Masses and liturgies described below;

2. Play for all weekend parish Masses at the Cathedral – Saturday (5:30 p.m.) and Sunday (10:30 a.m.);

3. Play for all special parish Masses – Christmas Eve (5:30 p.m., 10:30 p.m.), Christmas Day (10:30 a.m.), Ash Wednesday, Sacred Triddum, (Holy Thursday, Good Friday, Easter Vigil), Easter Sunday (10:30 a.m.), Holy days;

4. Play for all weddings and funerals at the Cathedral (See Employee Agreement Addendum);

5. Play for all Diocesan Events at the Cathedral in accord with the Office of Divine Worship Employee Agreement;

6. Secure substitutes when needed. (Pet., p. 38a).

The employment agreement provided the following job description for the position of Music Director.

> 1. Prepare music for all parish Masses and liturgies described above in consultation with the Rector / Pastor when necessary;
>
> 2. Recruit and train choir members and cantors;
>
> 3. Conduct weekly choir/cantor rehearsals;
>
> 4. Prepare the cantor for all Saturday and Holy Day Masses at the Cathedral;
>
> 5. Prepare the choir for all Sunday and Special Masses at the Cathedral;
>
> 6. Prepare all liturgical aids in cooperation with the parish secretary;
>
> 7. Secure substitutes or instrumentalists and additional vocalists when needed. (Pet., p. 38a) (emphasis in original).

These duties formed the basis of the Respondent's argument characterizing Petitioner's duties as lying at the very core of the Catholic church service.

Respondent filed a motion to dismiss Tomic's claim under Title VII arguing that a lay employee of a religious institution

should be deemed a "minister" where his or her primary duties consist of supervision and participation in religious ritual and worship. Respondent argued that the "ministerial exception" precluded application of Title VII to the employment relationship between Petitioner and the Diocese.

The District Court agreed, finding that Tomic's duties and functions in his position as Director of Music and Organist "were integral to the spiritual and pastoral mission of the Diocese, thereby falling within the contours of the ministerial exception." (Pet., p. 18a). The court further explained that:

> As such, his claims attacking the reasonableness of the Diocese's personnel decision with respect to his employment status and the circumstances of his discharge involve ecclesiastical decisions that are placed beyond the subject matter jurisdiction of the Court by the Free Exercise Clause of the First Amendment (Pet., p. 18a).

The District Court declined to exercise jurisdiction over the remaining common law claims and dismissed the suit (Pet., p. 19a).

The Seventh Circuit Court of Appeals affirmed, explaining that, even if a suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the church's management. The court reaffirmed the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006).

The court explained that First Amendment concerns with assuming jurisdiction are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second concern is that in

investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination was purely nondoctrinal. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006).

As to Petitioner's role as music director, the court noted that music is an integral part of Catholic religious traditions as it is in many other religions. The court emphasized that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. As such, the court concluded that Petitioner's duties, unlike those, say, of the person who tunes the organ, had a significant religious dimension. As such, the ministerial exception applied to Petitioner's position and the court lacked jurisdiction over the case. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006).

The court also addressed a recent decision of the Second Circuit Court of Appeals, *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006), which held (over dissent) that the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb *et seq*. (RFRA) amended the ADEA to wipe out the ministerial exception and substitute the RFRA's standard. The court found the decision unsound, agreeing with established and, until now, unanimous authority that the RFRA is applicable only to suits to which the government is a party. The court noted that it is difficult to imagine that, in seeking to broaden the protection of religious rights Congress, "dropping nary a hint," wiped out a long established doctrine that gives greater protection to religious autonomy than the RFRA does. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

ARGUMENT

Reasons for Denying the Petition

A. Where a Church Employee's Position is Important to the Spiritual and Pastoral Mission of the Church, He or She is Considered a Member of the Clergy for Purposes of the Ministerial Exception to Employment Discrimination Laws.

The ministerial exception to Title VII was first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972), and has since been recognized in almost every federal judicial circuit.[1] The exception is rooted in the independence of the spiritual lives of religious bodies in accordance with the dictates of the First Amendment. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000). Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to impose a secular court's view of whether religious

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[1] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Redhead v. Conference of Seventh-Day-Adventists*, 2006 WL 2075196 (E.D.N.Y.); *Petruska v. Gannon University*, 350 F. Supp.2d 666, 682 (W.D. Pa. 2004); *E.E.O.C. v. Roman Catholic Diocese of Raleigh,, N.C.*, 213 F.3d 795 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002) (referred to as the "church autonomy doctrine."); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455 (D.C. 1996).

doctrine and canonical law support the decision the church authorities have made. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991).

The relationship between an organized church and its ministers "is its lifeblood." The minister is the chief instrument by which the church seeks to fulfill its purpose. As such, matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. *McClure*, 460 F.2d at 558-59; see also *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986); *Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). It is well-settled that religious controversies are not the proper subject of civil court inquiry. Religious bodies must be free to decide for themselves, free from state interference, matters which pertain to church government, faith and doctrine. *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

Application of the ministerial exception has not been limited to cases involving clergy. Lay employees of religious institutions have been deemed "ministers" for the purposes of the exception where their primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). The determination focuses on the function of the employee and the exception is applied if the position is "important to the spiritual and pastoral mission" of the religious institution. *Rayburn*, 772 F.2d at 1169 (4th Cir. 1985).

The ministerial exception does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes. See *Rayburn*, 772 F.2d at 1171-72. Rather, the scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First

Amendment. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999). Its application in a given case requires a fact-specific inquiry. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 801.

Petitioner argues that the lower courts have reached varying positions on the scope of this exception and that this Court's clarification of the issue is "sorely needed." (Pet., p. 10.) As noted above, application of the ministerial exception is a fact-intensive inquiry utilized on a case-by-case basis. As such, it comes as no great surprise that courts will arrive at different conclusions based on varying circumstances. Nevertheless, an examination of the cases employing the ministerial exception reveals a high level of consistency in the manner and approach taken by the various circuits in an area of law that continues to develop.

For example, where an ordained minister files suit under Title VII, and where that claim is directed at an employment decision of a church, courts uniformly hold that such claims are barred under the ministerial exception.[2] The Ninth Circuit

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[2] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, Slip Op. 2006 WL 306654 at 4 (Feb. 8, 2006, D. Conn.) ('We cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.') quoting *Combs v. Central Texas Annual Conference Of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Little v. Wuerl*, 929 F.2d 944, 947 (3rd Cir. 1991) ("...courts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where discrimination is alleged on the basis of race or sex."); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942 (6th Cir. 1992) ("We conclude that the First Amendment bars civil courts from reviewing decisions of religious judicatory bodies relating to the employment of clergy."); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 958 (9th Cir. 2004)

carved out an exception to this rule in Title VII claims where clergy allege sexual harassment. The court explained that allegations of sexual harassment are not a protected employment decision. But to the extent that the sexual harassment claims implicate the Church's ministerial employment decisions, those claims remain foreclosed. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999).

Although the Second Circuit has not explicitly adopted the ministerial exception, it has not rejected it either. Indeed, a number of district courts from that circuit have addressed the issue in substance, if not in name, and have arrived at the same conclusion that would have been obtained in the majority of other circuits. For example, in a recent district court decision emanating from the Second Circuit, the court addressed a claim for racial discrimination brought by an ordained priest of the Catholic Church.[3] The court held that in a suit involving an employment decision with respect to one of its ministers, courts lack jurisdiction because the Free Exercise Clause bars court involvement in the employment relationship between a minister and a church.

In the case of lay employees, courts have held that the ministerial exception applies to employees of religious institutions whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order,

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(". . . to the extent Elvig's claims necessarily involve an inquiry into the Church's *decision* to terminate her ministry, those claims cannot proceed in civil court and were properly dismissed."); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455 (D.C. 1996).

[3] *Rweyemamu v. Cote*, Slip Op. 2006 WL 306654 (Feb. 8, 2006, D. Conn).

or supervision or participation in religious ritual and worship. *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 461 (D.C. 1996). If their positions are important to the spiritual and pastoral mission of the church, they are considered clergy for purposes of the ministerial exception. *Rayburn*, 772 F.2d at 1169.

This inquiry is necessarily fact-specific, but even so, and while the law continues to develop, courts have applied the exception consistently and uniformly. A number of courts have addressed the precise issue in the present case: whether a music director of a church is considered clergy for purposes of the ministerial exception. The Courts that have addressed this issue have uniformly concluded that the exception applies.[4]

For example, in *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000), the Fourth Circuit addressed a Title VII claim brought by a Director of Music Ministry. The court found that the position of music director was important to the spiritual and pastoral mission of the church, noting the "undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred." *Id.* at 802. The court explained that music is an integral part of many different religious traditions, serving a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty. *Id.* at 802.

The court refused to demote music below other liturgical forms or to sever it from its spiritual moorings ("Whether

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[4] *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, N.C., 213 F.3d 795 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999). *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp.2d 1174 (E.D. Wis. 2001); *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. 2004); *Assemany v. Archdiocese of Detroit*, 173 Mich. App. 752, 434 N.W.2d 233 (Mich. 1988).

spoken or sung, psalms lift eyes unto the hills. It is not for us to place the oratorios of Handel, the cantatas of Bach, or the simplest of hymns beneath the reading of the sacred texts from which they draw."). *Id.* at 802. The court paraphrased a statement by Justice Black of the United States Supreme Court stating that the inspirational appeal of religion in the guises of music, architecture, and painting is often stronger than in forthright sermon. *Id.*, quoting *People of State of Ill. ex rel. McCollom v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 236, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

The court concluded that the role of the music minister is so significant in the expression and realization of the church's beliefs that state intervention in the appointment process would excessively inhibit religious liberty. Because employment decisions concerning a music director relate to how and by whom churches spread their message, these decisions lie beyond judicial competence. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 804.

There is no dispute among decisions rendered by courts which have considered the application of the ministerial exception to persons who occupy a position of music director. All courts have applied the ministerial exception to bar actions against a church by a lay person serving in that capacity. Here, Tomic served as a music director and represented the voice of the Church in spreading its message through music. As such, the ministerial exception was properly applied to bar his action against the Church.

Petitioner opened his argument before this Court with the following declaration:

> The court of appeals held in this case that the Constitution forbids the courts from entertaining an employment discrimination complaint brought by a lay employee of a religious institution, even though that

> employee was not holding a position reserved for members of the faith, and even though the defendant employer has never contended that the employee was terminated for religious reasons. (Pet., p. 8).

With respect, Respondent submits that this statement is profoundly misleading. To accept that statement as true would mean that the decision of the Circuit Court below stands for the proposition that a lay employee of a church, such as a janitor or gardener, who has no connection whatsoever with the church's religious message, is incapable of bringing suit under Title VII. No court, anywhere in the United States, has ruled in this manner.

In its decision, the court below discussed at length the facts demonstrating that Petitioner's duties were primarily religious in nature. As the court noted, since "Tomic's duties, unlike those, say, of the person who tunes the organ in St. Mary's Cathedral, had a significant religious dimension, Tomic forfeited his rights under the Act." *Tomic v. Catholic Archdiocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006).

As to Petitioner's repeated claim that the position of Music Director was not a position reserved for members of the Catholic faith, it is important to determine just how Petitioner arrived at this conclusion as the issue was never raised in the lower courts. The assertion apparently derives from a single sentence in the Petition where Tomic notes that the Handbook "nowhere suggests. . .that petitioner's positions were reserved for persons of the Catholic faith." (Pet., p. 3).

The Handbook does not list the positions reserved for members of the faith nor would one expect that it would. The foundation for Petitioner's inference that no religious considerations were involved in the hiring decision of the Music Director is highly suspect, particularly in light of the

duties of his position which, by definition, require an extensive knowledge of music used in the Catholic liturgy.

The "Position Goal" of the Music Director requires him to assist the Office of Divine Worship in "preparing and celebrating" the diocesan liturgies. (Pet., p. 32a). That provision of the employment agreement demonstrates beyond question that the Music Director plays a prominent and indispensable role in the Catholic worship service. As such, the Music Director must be considered a member of the clergy for purposes of a claim under employment discrimination laws. Any inquiry into the personnel decisions affecting this position are *per se* religious matters and cannot be reviewed by civil courts.

B. In an Area of Law That Continues to Develop, the Circuit Courts Have Applied a Reasoned and Consistent Approach to Addressing the Ministerial Exception to Church Employees' Claims of Employment Discrimination.

Petitioner contends that a serious conflict exists among the Circuits in both the scope and application of the ministerial exception. He suggests that the Fourth, Fifth, Seventh and D.C. Circuits employ a liberal interpretation of the ministerial exemption, whereas the Second, Third and Eighth Circuits have taken a "narrower and more nuanced approach." (Pet., p. 9). An examination of the opinions from these Circuits reveals a remarkable consistency in the outcomes of these cases.

Application of the Ministerial Exception

Although the Petitioner argues that various circuits apply the ministerial exception differently, a close reading of the cases demonstrates to the contrary. While he singles out the Second, Third and Eighth Circuits as different from the Fourth,

Fifth, Seventh and DC Circuits, there are, in actuality, no differences which present any conflict in the Circuits' approach.

As noted above, the Second Circuit has neither explicitly adopted the ministerial exception nor rejected it. But its opinion in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993), addressed many of the same issues. In *DeMarco*, a lay math teacher brought suit against a parochial school under Title VII. Instead of relying on the ministerial exception, the school argued that the court could not reach the merits because, as a religious school, it was statutorily exempt from the ADEA's anti-discrimination provisions.

The *DeMarco* court was never asked to rule on the ministerial exception, but its ultimate ruling was based, in large part, on many of the same principles. At the outset, the court distinguished a line of cases involving the ministerial exception, finding that these cases "are inapposite, since each one deals with the pervasively religious relationship between a member of the clergy and his religious employer."[5] Accordingly, had DeMarco been an ordained minister, the court may well have adopted the ministerial exception.

However, DeMarco was just a math teacher. Although he did devote some of his time in leading the students in prayer and taking them to Mass, his primary duties were not religious in nature. The Second Circuit allowed the case to proceed, confident that the district judge would be able to focus the trial upon whether Mr. DeMarco was fired because of his age or because of a failure to perform religious duties. *DeMarco*, 4 F.3d at 172.

Had *DeMarco* arisen in the Seventh Circuit, there is little doubt that the court would have concluded that his secular duties outweighed the spiritual and refused to apply the ministerial exception.

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[5] *DeMarco v. Holy Cross High School*, 4 F.3d 166, 171 (2nd Cir. 1993)

Even though the Second Circuit Court of Appeals has not specifically addressed the ministerial exception, the district courts within the Circuit have shown no reluctance to grapple with the issue. In a very recent district court decision from the Second Circuit involving yet another lay teacher suing a parochial school, the court explicitly adopted the ministerial exception to be used in conjunction with the Religious Freedom Restoration Act in resolving the claim. *Redhead v. Conference of Seventh-Day-Adventists*, 2006 WL 2075196 (E.D.N.Y.).

The court concluded that the ministerial exception did not apply as the plaintiff's teaching duties were primarily secular and those religious in nature were limited to only one hour of Bible instruction per day. An examination of this opinion, along with *DeMarco*, suggests that there is no reason to suspect that the Second Circuit's treatment of the ministerial exception is any more "narrow or nuanced" than that of the Seventh Circuit.

Petitioner also identifies the Third Circuit as employing a narrower interpretation of the ministerial exception, citing *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993), which involved a lay teacher's Title VII claim against her parochial school. The church argued that it fired plaintiff because she violated church doctrine. The Third Circuit opened its analysis with reference to a fundamental principle underlying the ministerial doctrine common to all courts that have addressed the issue: that there is a distinction between cases in which clergy are involved and cases in which employees do not have duties of a religious nature. *Geary*, 7 F.3d at 331.

The court also expressed confidence that courts will continue to consider these situations on a case-by-case basis, looking in each case to see whether the plaintiff's employment discrimination claim can be adjudicated without entangling the court in matters of religion. *Id.*

These two principles lie at the heart of the ministerial exception inquiry as applied by other circuits. In accord with

the First, Fourth, Fifth, Seventh, and Eighth Circuits, the *Geary* decision acknowledged that, in cases involving lay employees who have at least some duties of a religious nature, courts must carefully analyze the extent of those religious duties on a case-by-case basis in order to weigh the risk of entangling the court in matters of religion. Employment discrimination suits by lay parochial school teachers present a particularly difficult example of this inquiry due to the fact that, by definition, at least some of their duties will involve propagation of a church's religious message. The Seventh Circuit has not yet had an opportunity to address a case such as this. But if it does, there is no reason to presume that the outcome would differ appreciably from the outcomes in both *DeMarco* and *Geary*.

The *Geary* court ultimately found that application of the ADEA to this parochial school lay employee would not present a significant entanglement with religion. Even so, the court noted that, as required under *McDonnell Douglas*, she would be required to refute the school's proffer of a legitimate reason for her dismissal. In this case, the school claimed that plaintiff's termination was due to her violation of church doctrine. The *Geary* court warned that "any challenge to the validity or 'plausibility' of the religious reason would of course do damage to the protection afforded Visitation School by the First Amendment." *Geary*, 7 F.3d at 331

In other words, in full accord with the other Circuits, the *Geary* court held that many claims brought by lay employees of a religious organization will raise no serious constitutional questions. To the extent that the claims do impinge on the employer's religious justification, that court's inquiry will come to an immediate halt. Accordingly, to the extent that the court's analysis differs from those of the majority of Circuits, that difference would have been unlikely to produce a different outcome.

Finally, Petitioner identifies the Eighth Circuit as employing a narrower approach to the ministerial exception. In

support, Petitioner cites *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994), which involved a lay employee responsible for supervision of clerical, building maintenance, and custodial personnel. He was a high level janitor who had no role in decisions relating to spiritual matters. It comes as no surprise that the court refused to apply the ministerial exception. Indeed, it is difficult to see how this case can possibly demonstrate a rift with the Seventh Circuit's decision in *Tomic* when the Seventh Circuit, and every other Circuit, would have arrived at the very same conclusion.

Later in the Petition, Tomic argues that the Seventh Circuit's decision in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003), presents a "particularly striking" conflict with the Eighth Circuit's decision in *Weissman*. Petitioner claims that the temple administrator's role in *Weissman* was "quite similar" to the function of the press secretary in *Alicea-Hernandez*. This is a remarkable statement. Plaintiff in *Weissman* supervised the janitors working in the temple. He had absolutely no role in the dissemination of the temple's message. In contrast, the press secretary in *Alicea-Hernandez* was directly responsible for communicating the church's message to its congregation. To suggest that Weissman's role was in *any way* similar to the duties of Chicago's Archdiocese is disingenuous.

Another decision emanating from the Eighth Circuit. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), demonstrates that this Circuit is fully aligned with the majority of Circuits on the issue of the ministerial exception. In that case, an ordained priest, who worked as a chaplain at a church affiliated hospital, filed a claim under Title VII. The court carefully examined the nature of her duties and concluded that her "position as Chaplain is primarily a "ministerial" position." *Scharon*, 929 F.2d at 363. She was not a secular employee who happened to perform

some religious duties. Rather, she was a spiritual employee who also performed some secular duties. *Id.* at 362.

In full accord with the majority of Circuits that have adopted the ministerial exception, the court acknowledged that "courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." *Scharon*, 929 F.2d at 363, n. 3. The court expressed its confidence that courts will continue to consider these situations on a case-by-case basis, looking in each case to see whether the plaintiff's employment discrimination claim can be adjudicated without entangling the court in matters of religion. Although the Eighth Circuit never used the phrase "ministerial exception" in the *Scharon* decision, the court's analysis, as well as the outcome of the case, is entirely consistent with the majority of Circuits employing the ministerial exception.

Application of the ministerial exception to employment discrimination suits is an issue that continues to develop in the Circuit Courts. Although some differences exist, the courts have consistently embraced the fundamental principles underlying the exception. Cases involving ordained ministers are beyond the purview of the courts. At the opposite end of the spectrum, no exception applies to lay employees who perform no religious duties. As to lay employees whose duties are only partially religious, the courts will engage in a fact-specific analysis and ultimately decide the claims on a case-by-case basis.

Scope of the Ministerial Exception

Petitioner's attempts to demonstrate wide disagreement among the Circuits on the issue of the scope of the exception is similarly unavailing. Petitioner singles out the Seventh Circuit as holding the most expansive interpretation of the exception based on its opinion in *Alicia-Hernandez*, where the court

found that the ministerial exception applied to the Hispanic Communications Manager of the Catholic Diocese of Chicago.

The case presented an issue of first impression, which the court resolved by reference to established case law interpreting the ministerial exception. The court explained that the exception is applied by looking to the function of the employee, not categorical notions of who is or is not a minister. The court engaged in a fact specific analysis of her role in the Church and concluded that a press secretary is often the primary communication link to the general populace. "The role of a press secretary is critical in message dissemination, and a church's message, of course, is of singular importance." *Alicea-Hernandez*, 320 F.3d at 704.

Petitioner contrasts this interpretation of the exception with that of the Fourth and Fifth Circuits arguing that a different standard applies in those Circuits. In doing so, Petitioner neglects to point out that the *Alicea-Hernandez* decision relies almost entirely on Fourth and Fifth Circuit authority to support its conclusion.[6] Indeed, the Seventh Circuit quoted the Fourth Circuit's opinion in *Rayburn*, holding that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."[7] The *Alicea-Hernandez* decision can thus be seen as entirely consistent with decisions of the Fourth and Fifth Circuits.

Petitioner continues to strain to locate some hint of conflict in the Circuits when he argues that the Second, Third, Eighth

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[6] *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

[7] *Alicea-Hernandez v Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003), quoting *Rayburn v. General Conference Of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

and Ninth Circuits "have allowed discrimination complaints to go forward even when the plaintiffs ['] duties had significant religious components, and in some cases even when the plaintiffs were ministers by any definition." (Pet., p. 16). Petitioner backs off this position in a footnote, conceding that the Eighth and Ninth Circuits have, in fact, applied the exception to members of the clergy, and that the Second Circuit has never addressed the issue. Petitioner's sole authority for the questionable statement quoted above is based on a decision of the Third Circuit, *Petruska*, which has been vacated.

There is, in fact, only one line of cases where the ministerial exception has not been applied to members of the clergy. As discussed above, the Ninth Circuit held in *Bollard* that claims of sexual harassment brought by a member of the clergy, which do not implicate an employment decision, are not barred by the ministerial exception. The court's refusal to apply the exception to these particular cases raises no conflict whatsoever with the other Circuits' application of the ministerial exception. There is no reason to suspect that the majority of Circuits, given the opportunity, would not arrive at the very same conclusion. Other than sexual harassment cases, the Ninth Circuit's treatment of the ministerial exception is consistent with the analyses of the other Circuits.

Petitioner points to a number of decisions from the Second and Third Circuits that allowed the plaintiff to challenge a defendant's proffer of a religious explanation for its employment decision. These decisions stand for the proposition that a court may determine whether the religious reason actually motivated the church's dismissal, so long as the plaintiff does not challenge the validity of the religious doctrine on which the employer relies. It is significant that each of the cases upon which Petitioner relies involve lay teachers suing a parochial school, cases that present the most difficult challenge to the courts' application of the ministerial exception.

Had these cases involved ordained ministers, the inquiry would be resolved without any need to address the defendant's explanation for its employment decision. All Circuits, including the Second and Third, consistently hold that inquiries into employment decisions regarding ministers are *per se* religious matters beyond the court's purview. The same analysis would apply had those decisions involved a music director, like Tomic, whose primary duties involved a prominent and indispensable role in the actual worship service.

Accordingly, the distinction Petitioner raises is confined to a narrow set of circumstances involving lay teachers' claims of employment discrimination against parochial schools, an issue which the Seventh Circuit, and many other Circuits, have not yet had the opportunity to address. As the law on this issue is still in a state of development, and the apparent conflict is confined to a narrow set of circumstances, the issue is not yet ripe for review.

C. The Apparent Conflict Generated by the Second Circuit's Determination That the Religious Freedom Restoration Act Supplants the Ministerial Exception is in the Process of Being Resolved in the Second Circuit and is, Therefore, Not Ripe for Review.

After oral argument in this case, the Second Circuit in *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006), held (over dissent) that the Religious Freedom Restoration Act,[8] amended the ADEA substituting the RFRA's standard, which requires deciding whether a particular law imposes a substantial burden on religious activity, in place of the ministerial exception. Neither party raised or briefed this issue before the Seventh Circuit.

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[8] 42 U.S.C. §§2000bb *et seq*

The Seventh Circuit found the *Hankins* decision to be unsound and now Petitioner asks this Court to resolve this conflict between the Circuits. A recent district court decision from the Second Circuit, filed on July 27, 2006, appears to have addressed and resolved this apparent conflict.

In *Redhead v. Conference of Seventh-Day-Adventists*, 2006 WL 2075196 (E.D.N.Y.), the district court noted that, in remanding *Hankins* to the district court for reconsideration under the RFRA, the Second Circuit provided no instructions as to how the RFRA should be applied. Since the district court has not yet issued a decision following remand, the court found that it was the first to consider how to analyze an employment discrimination issue under the RFRA.

The court relied on a very recent decision of this Court, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S.Ct. 1211, 1223, 163 L.Ed.2d 1017 (2006), where this Court reaffirmed the principle that judicially crafted exceptions are relevant when applying the RFRA's compelling interest test. The Court also reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Id.* at 1223.

On this basis, the district court concluded that, even if an analysis of discrimination claims against non-governmental entities under the RFRA is appropriate, the RFRA and the ministerial exception are not mutually exclusive. The court then explicitly adopted the reasoning in *Tomic*, finding that a serious constitutional issue would be presented if Congress, by stripping away the ministerial exception, required federal courts to decide religious questions. The court concluded that the ministerial exception is *necessary* for a case-specific application of the compelling interest test under the RFRA and is the kind of judicially crafted exception envisioned by the Supreme Court in *O Centro Espirita*.

Accordingly, it appears that the apparent conflict between the *Tomic* and *Hankins* decisions is in the process of being

resolved. It should also be noted that the *Hankins* decision is not yet a final decision. To the extent that any conflict remains, the Second Circuit should be afforded the opportunity to settle it. Finally, the *Hankins* decision will also come under attack in a separate appeal in *Rweyemamu v. Cote*, Slip Op. 2006 WL 306654 (D. Conn. 2006), where a notice of appeal is already on file. In all, the issue of any conflict between the ministerial exception and the issue of the Religious Freedom Restoration Act is not ripe for review.

CONCLUSION

WHEREFORE, Respondent CATHOLIC DIOCESE OF PEORIA respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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